92-411

No. 2

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

PERFECTO SOCORRO MUNOZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. On December 26, 1990, a Search Warrant was issued by a United States Magistrate for the Western District of Texas, San Antonio Division authorizing Federal Officers to seize the person of co-defendant, Maximo Garcia and to search his residence located at 9367 Valley Bend in San Antonio, Texas. The Search Warrant did not command or order the seizure or search of petitioner, Perfecto Socorro Munoz, or any of his real or personal property. Petitioner, arrived at the residence of co-defendant on December 26, 1990 with co-defendant as a passenger in petitioner's automobile, prior to the execution of the Search Warrant. Petitioner was immediately arrested upon exiting from his automobile and searched. Less than an ounce of cocaine, a weight list, cash and other items of personal property were found inside a bank bag which petitioner had been carrying at the time that he exited from his vehicle. The Search Warrant was later executed on the premises of co-defendant and 322 pounds of marijuana were found inside the residence. Petitioner filed a motion to suppress all statements, evidence and controlled substances seized from him on the basis that he was illegally arrested and searched because of the absence of probable cause. The trial court overruled the motion to suppress and allowed all of the items seized to be introduced into evidence. In this regard, did the Fifth Circuit Court of Appeals correctly apply the principles of law enunciated by this court in *Ybarra v. Illinois*, 444 U.S. 85, when the record shows that the federal agents lacked ample information to establish "individualized probable cause" to arrest or search petitioner?

2. During the course of the trial, petitioner, was unable to have compulsory process to obtain witnesses in his favor as guaranteed by the Sixth Amendment to the United States Constitution when he was deprived of his right to call his co-defendant, to the stand when, almost at the end of the trial, the co-defendant announced that he had made a plea bargain

agreement with the government but wanted to wait until all sides closed their case in order to preserve his Fifth Amendment rights and not be called as a witness for petitioner. In this regard, did the Fifth Circuit Court of Appeals err when it found that petitioner's Sixth Amendment right to call his co-defendant to testify had not been violated because petitioner did not attempt to call his co-defendant as a witness during the trial?

3. Petitioner filed a motion for new trial based on newly discovered evidence in the trial court, citing as its basis that the co-defendant would, in the event of a new trial, testify that the marijuana, the cocaine and the weight list found in the white interfirst bank bag were his and that petitioner had nothing to do with either, the marijuana, cocaine or the weight list. The trial court denied the motion for new trial based on newly discovered evidence without a hearing. In this regard, did the Fifth Circuit of Appeals err when it held that the trial court did not abuse its discretion when it overruled petitioner's motion for new trial because petitioner failed to show that the evidence was newly discovered and that petitioner's failure to call his co-defendant at trial established a lack of diligence on his part?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. PERFECTO SOCORRO MUNOZ, a/k/a CHITO, Petitioner;

2. MAXIMO GARCIA, Co-Defendant;

3. UNITED STATES OF AMERICA, Respondent;

4. OSCAR J. PENA, SR., Attorney of Record for Perfecto Socorro Munoz, a/k/a Chito;

5. JULIO A. GARCIA, Attorney for Perfecto Socorro Munoz.

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No.

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vs.

UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

Petitioner, Perfecto Socorro Munoz, has brought this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit from the rendition of a judgment entered by said court on the 20th day of March, 1992. Thereafter, a petition for rehearing was filed by petitioner with the Fifth Circuit

Court of Appeals on or about the 1st day of April, 1992 and which petition for rehearing was overruled by the Fifth Circuit of Appeals on the 20th day of April, 1992.

This petition for a writ of certiorari is being filed pursuant to 28 U.S.C. § 1254(1) and Rules 13(1) and 13(4) of the Supreme Court Rules.

OPINION AND JUDGMENT BELOW

The published opinion of the Fifth Circuit Court of Appeals bearing slip opinion no. 91-5704 is attached to and made a part of the appendix hereto and is referred to as Appendix A.

The amended judgment of the United States District Court, Western District of Texas, San Antonio Division is attached to and made a part of the appendix hereto and is referred to as Appendix B.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Trial Court Below.

The petitioner, Perfecto Socorro Munoz, and co-defendant, Maximo Garcia, were arrested on the 26th day of December, 1990 in San Antonio, Texas. The co-defendant was arrested by virtue of a Search Warrant commanding the search of his residence located at 9367 Valley Bend in San Antonio, Texas and ordering his arrest and seizure. Petitioner was not named in the Search Warrant but was, nonetheless, arrested upon his arrival with co-defendant at the latter's residence prior to the execution of the Search Warrant. They were both subsequently, indicted. Petitioner was charged with conspiracy to unlawfully, knowingly, and intentionally distribute a quantity of marijuana (Count I) and with unlawfully, knowingly and intentionally possessing with intent to distribute a quantity of cocaine (Count III). Thereafter, a pre-

trial motion to suppress was filed by petitioner seeking to suppress 1) All testimony concerning petitioner's arrest and the search and seizure incident thereto; 2) All testimony concerning statements allegedly made by the petitioner while in custody; 3) All tangible items or evidence allegedly seized incident to petitioner's arrest; and 4) All testimony concerning tangible items or evidence allegedly seized incident to petitioner's arrest on the basis that the search and seizure was conducted in violation of the rights secured to petitioner by the Fourth Amendment to the United States Constitution. A hearing was had on this motion to suppress, and same was overruled by the court. Thereafter, the case proceeded to trial on the 3rd day of April, 1991 and with a jury, duly selected, returning a verdict of guilty against petitioner herein on Counts I and III of the Indictment. At the end of the Government's case in chief, petitioner moved for an instructed verdict of acquittal, which was denied by the court, and again re-urged the same motion at the conclusion of all of the testimony. The petitioner filed a motion for new trial based on newly discovered evidence on the 28th day of June, 1991 which was denied by the court without a hearing. The petitioner was sentenced on the 21st day of June, 1991. The notice of appeal was filed on the 19th day of July, 1991, within ten (10) days from the order of the trial court denying the motion for new trial based on newly discovered evidence..

STATEMENT OF FACTS

A. Confidential Informer

Generally, the facts and circumstances relevant to the issues presented to this Honorable Court for review, gravitate and revolve around the information provided to an investigator for the District Attorney's office of San Antonio, Bexar County, Texas, Guillermo Guerra. Officer Guerra testified that the Confidential Informer had previously been arrested, charged and indicted for a criminal offense for which he was placed on probation. It was during the

pendency of this criminal charge against the Confidential Informer, that the information, which ultimately formed the basis for the Search Warrant in this case, was provided to Officer Guerra. Officer Guerra testified during the course of the hearing on petitioner's, Perfecto Socorro Munoz, motion to suppress, that the only information which the Confidential Informer had provided was with regards to co-defendant, Maximo Garcia, and only on this one instance. The previous information which Officer Guerra attributed to the Confidential Informer which had proved to be reliable in the past, was the address of co-defendant, his telephone number and the fact that he had been born in Mexico. Additionally, Officer Guerra stated that the Confidential Informer had advised him that within 72 hours prior to December 26, 1990 he had seen, inside the residence of co-defendant located at 9367 Valley Bend, large quantities of marijuana. Additionally, the Confidential Informer advised Guillermo Guerra that co-defendant was going out of town for the Christmas Holidays but would be returning to his residence at some point on Wednesday, December 26, 1990. During the course of the hearing on petitioner's motion to suppress, co-defendant testified that he had left San Antonio, Bexar County, Texas on the 2lst day of December, 1990 and remained in Nuevo Laredo, Tamaulipas, Mexico until the 26th day of December, 1990 at 4:30 P.M. when he returned to San Antonio, Texas.

Officer Guerra testified that he passed on this information to Officer David Ambrose, an agent with the Drug Enforcement Administration in San Antonio, Texas and Officer Ambrose, in turn, swore to the affidavit which ultimately formed the basis for the application of the Search Warrant. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT, THE APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT, AND SEARCH WARRANT WERE NOT DIRECTED TO PETITIONER. BUT WERE DIRECTED

SOLELY AT THE RESIDENCE OF CO-DEFENDANT AND THE PERSON OF CO-DEFENDANT.

B. The Arrest, Search and Seizure of Petitioner

Even though the Search Warrant, commanding that the residence of co-defendant, located and situated at 9367 Valley Bend in San Antonio, Texas be searched and the person of co-defendant be seized, was issued at 1:45 P.M., the agents in charge of executing the Search Warrant waited until approximately 4:30 P.M. to do so. At approximately 4:30 P.M. petitioner and co-defendant arrived at the residence of co-defendant in petitioner's automobile. As they alighted from the vehicle, they were immediately arrested and handcuffed by Officers Guerra, Ambrose and Robinson. Petitioner was immediately arrested, placed in a cursory search position and instructed to place his hands on a stationary Lincoln automobile which was on the premises. In doing so, petitioner placed a coat, a white Interfirst City Bank Bag and a box of Marlboro Lights cigarettes on the trunk of the stationary Lincoln automobile. Thereafter, officer David Ambrose unzipped and opened the bank bag, searched through it and discovered amongst other items of personal property, the following: 1) a gold bracelet; 2) a white ziploc bag containing a white powdery substance which agent Ambrose suspected, and later was confirmed as being less than one ounce of cocaine; 3) a Southwestern Bell Tell Telephone Card; 4) municipal court letter sent to petitioner from the City of Leon Valley, Texas; and 5) a white piece of notebook paper which contained numbers and assumed weights of approximately forty-five marijuana bundles later located inside the residence of co-defendant. Petitioner was then handcuffed and taken along with his co-defendant inside the residence of co-defendant.

Entry into co-defendant's house was obtained through the garage door with the assistance of co-defendant. Once inside the

premises, the officers in charge, and now assisted by a fourth agent, Joe LaSoya, searched the premises, finding forty-five bundles of Marijuana with each bundle weighing approximately 3 1/2 to 4 1/2 pounds, Ziplock plastic baggies, a scale, duct tape, and other items. Thereafter, an inventory was made and the petitioner charged and incarcerated. All of the evidence and statements herein above set out was admitted into evidence over defense counsel's objections.

C. The In-Camera Interview with the Confidential Informer.

During the course of the hearing on the motion to suppress, and contrary to the informant's statement that he had been inside co-defendant's residence 72 hours prior to December 26, 1990, co-defendant testified that he had not been in his house during the previous 72 hours prior to December 26, 1990 and that he had not authorized anyone to enter his residence during that period of time. At this point, Trial Judge Edward C. Prado determined, in accordance with a prior request by trial counsel that an in-camera interview with the Confidential Informer should be had and recorded, and did, in fact, hold such an interview. Accordingly, the trial court found after considering the interview with the Confidential Informer that the affidavit submitted to the magistrate reflected probable cause, and also ascertained that the information in the Search Warrant was fresh, new and recently obtained. This interview was not provided to appellate counsel for his review, in accordance with the order entered by his Honor Judge Edward C. Prado.

D. The Unavailability of the Co-Defendant To Testify in Favor of Petitioner During the Course of the Trial.

Petitioner was tried jointly with his co-defendant and co-defendant, was, therefore unavailable to testify on behalf of petitioner during the course of the trial. However, co-defendant's

trial counsel advised the court prior to the closing of the testimony in the case, that co-defendant had entered into a plea bargain agreement with the United States Government whereby he would plead guilty to Count II of the Indictment, (Possession Count). However, he made it clear that he would not plead until all sides had rested thereby insuring his client's right to plead the Fifth Amendment, if he were called as a witness during the course of the trial. This denied petitioner the right to call witnesses on his behalf and to have process available to call them, in violation of his Sixth Amendment rights under the United States Constitution.

E. Statement Made By Co-Defendant to the Court at the Time of Sentencing.

At the time of his sentencing, co-defendant stated to the Honorable Judge Edward C. Prado, that the Marijuana found in the house was his, and that the cocaine and "weight list" found inside the Interfirst City Bank Bag were his and that petitioner had no proprietary interest in them.

F. The Filing of Petitioner's Motion for New Trial Based on Newly Discovered Evidence.

Based on co-defendant's statements to the Honorable Judge Edward C. Prado, at the time of his sentencing, in open court, petitioner filed his motion for new trial based on newly discovered evidence alleging that co-defendant had later stated to him as follows:

1) That the marijuana found at his house at 9367 Valley Bend, in San Antonio, Texas, on or about the 26th day of December, 1990 was his marijuana and that none of the marijuana belonged to petitioner.

2) Co-defendant acknowledged that petitioner was bringing him home to San Antonio, Texas when he was arrested at his house.

3) That prior to arriving in San Antonio on December 26th, he had placed a page of a notebook paper and some traces of cocaine in a bag belonging to petitioner. The page of notebook paper and the traces of cocaine also belonged to him.

4) That co-defendant informed petitioner that, in the event of a new trial, he would be willing to testify to the information hereinbefore set out.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals has adjudicated basic questions of federal law which conflict with this court's prior decision in *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 dL. Ed 2d 238 (1979), and the Sixth Amendment to the United States Constitution guaranteeing every person's right to have compulsory process for obtaining witnesses in his favor.

ARGUMENT AND AUTHORITIES

The Fourth Amendment to the United States Constitution guarantees to every individual the right to be free from unreasonable searches and seizures. (U.S. Const., Art. IV). The protections afforded by the Fourth Amendment, as interpreted by the United States Supreme Court, are the minimum protections against governmental intrusion that may be afforded an individual (*Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L. Ed. 570 [1975]). A determination as to whether or not there has been an illegal intrusion and transgression of the rights of petitioner to be free from unreasonable searches and seizures, requires a detailed analysis of the facts and circumstances surrounding this

case and must be cast right along side the existing and prevailing law. This analysis, out of necessity, must take several factors into consideration, all revolving around the applicability of the federal exclusionary rule.

I.

THE ARREST, SEARCH AND SEIZURE OF PETITIONER, PERFECTO SOCORRO MUNOZ, UNDER THE SEARCH WARRANT ISSUED IN THIS CASE.

Petitioner was arrested immediately after he exited his automobile upon arrival at the residence of co-defendant, Maximo Garcia, at 9367 Valley Bend in San Antonio, Texas, and well before the government started to execute the Search Warrant at the residence of co-defendant. The application and affidavit in support of the issuance of the Search Warrant and the Search Warrant contain no information with regards to petitioner. The Search Warrant did not command the seizure of petitioner nor did it command the search of petitioner's real or personal property. However, it did command the seizure of co-defendant and the search of co-defendant's residence located at 9367 Valley Bend in San Antonio, Texas. The Search Warrant did not authorize the arrest, seizure and/or search of petitioner and the White Interfirst Bank Bag which he had in his possession. It is clear from the holding in *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d. 238 (1979), that an officer executing a Search Warrant may not search all persons who happen to be present at the location at the time the warrant is executed. To justify a search of a person in executing a warrant, either the person must be named in the warrant or there must be probable cause to search the person independent of the warrant, (*see Ybarra*, supra).

II.

THERE WAS NO PROBABLE CAUSE FOR THE ARREST, SEARCH AND SEIZURE OF PETITIONER, PERFECTO SOCORRO MUNOZ.

A. There Was No Probable Cause Plus Exigent Circumstances to Authorize a Warrantless Search of Petitioner.

In the case before the Court, the record compiled in the court below indicates that petitioner was immediately arrested upon alighting from his automobile. At the time that petitioner exited from his vehicle, he had in his possession a white Interfirst Bank Bag and a coat which he placed on the hood of a stationary vehicle on the premises of co-defendant, Maximo Garcia. Immediately, thereafter, he was placed in a cursory search position and handcuffed with his hands behind his back. Thereafter, the Interfirst Bank Bag was opened by Officer Ambrose and a search of the Bank Bag revealed less than one ounce of cocaine, $1,000.00 in cash, a weight list containing the number forty-five with numbers which the government contended were weights of the bundles subsequently found inside the premises of co-defendant. The record shows that the government officers obtained a Search Warrant, waited for co-defendant to arrive at his residence before attempting to execute the Search Warrant and therefore, planned their Search Warrant activities. Established case law in this area indicates that when the search is planned, and the item or thing searched is beyond the effective reach of the accused, such as was the case with petitioner, and the obtaining of the warrant imposes no greater intrusion upon the accused than that already imposed on him, there is no exigent circumstance justifying a warrantless search. *United States v. Chadwick*, 97 S. Ct. 2476 (1977); *Michigan v. Tyler*, 98 S. Ct. 1942 (1978); *Mincey v. Arizona*, 98 S. Ct. 2408 (1978); *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586; *Florida v. Royer*, 103 S. Ct. 1319 (1983).

Consequently, when officers are faced with circumstances amounting to an emergency which make seeking and obtaining a warrant unfeasible, a search may be made without a warrant. *United States v. Gargotto*, (1974, CA6 Ky) 510 F.2d 409, *cert. den.*, 421 U.S. 987, 44 L. Ed. 2d 477, 95 S. Ct. 1990, *reh. den.*, 423 U.S. 884, 46 L. Ed. 2d 115, 96 S. Ct. 157. Such a situation exists 1) Where there is a danger of damage and possible loss or destruction of desired evidence. *United States v. Gargotto*, (1974, CA6 Ky) 510 F.2d 409, *cert. den.*, 421 U.S. 987, 44 L. Ed. 2d 477, 95 S. Ct. 1990, *reh. den.*, 423 U.S. 884, 46 L. Ed. 2d 115, 96 S. Ct. 157; 2) Where there is likelihood of a defendant's escape before a warrant can be obtained. *United States v. Coplon*, (1949, DC NY) 89 F. Supp. 142; 3) Where officers have a justifiable belief that a felony is being committed. *United States v. Mark Polus*, (1975, CA1 Puerto Rico) 516 F.2d 1290, *cert. den.*, 423 U.S. 895, 46 L. Ed. 2d 127, 96 S. Ct. 195; 4) In the case of a vehicle, where there is probable cause to search for contraband goods, and it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought, *Carroll v. United States*, (1925) 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790; *Brinegar v. United States*, (1949) 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302, *reh. den.*, 338 U.S. 839, 94 L. Ed. 513, 70 S. Ct. 31, or if the warrant could be obtained only by detaining the vehicle for some period. *United States v. Hawkins*, (1978) 193 App DC 366, 595 F.2d 751, *cert. den.*, 441 U.S. 910, 60 L. Ed. 2d 380, 99 S. Ct. 2005; 5) When officers are reacting to an immediate life-threatening emergency. *2nd Circuit - United States v. Barone*, (1964, CA2 NY) 330 F.2d 543, *cert. den.*, 377 U.S. 104, 12 L. Ed. 2d 1053, 84 S. Ct. 1940; 6) When a suspect is on the move and police are in hot pursuit. *Warden, Maryland Penitentiary v. Hayden*, (1967) 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642. None of these fact situations existed at the time of petitioner's arrest, search and seizure which would have dispensed with the need to obtain a Search Warrant.

B. The Search of Petitioner and the Bank Bag Was Not a Search Pursuant to an Investigative Stop.

Petitioner was immediately arrested upon his arrival at the residence of co-defendant. The federal officers had no information to lead them to believe that petitioner was armed and dangerous. As a matter of fact, his conduct and behavior at the scene of the arrest was rather docile and placid, and made no gestures or movements to indicate that they might be looking for trouble or attempt flight. There was no prior information leading the federal officers to believe that petitioner had either committed an offense or was in the process of committing an offense. As a matter of fact, the officers had no prior knowledge as to who petitioner was and whether or not he had been inside the residence of co-defendant. The Confidential Informer at no time indicated that petitioner had been inside the residence of co-defendant or that the marijuana inside the residence was owned by petitioner.

Based on these facts and circumstances, the federal officers did not have any reasonable suspicion, based on articulable facts that criminal activity was afoot and that petitioner was connected with any such activity, (*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Additionally, the federal officers, at the time of the arrest of petitioner, had already handcuffed him with his hands behind his back and there was nothing to indicate that petitioner might have been carrying a weapon either on his person or in the bank bag. A Terry search for weapons is not permitted on less than a reasonable belief or suspicion directed to the person searched, even though the person frisked is on the premises lawfully being searched pursuant to a warrant. *Ybarra v. Illinois*, 441 U.S. 85, 94 S. Ct. 338, 62 L. Ed. 2d 238 (1979), which invalidated the search of a person not named in the warrant. When a search is justified under *Terry*, supra, the officer is entitled to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons that might be used

for an assault. The search must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments. Such a limited search is conducted by "patting down" the person's outer clothing to feel for such weapons. However, a search is not justified by any need to prevent the disappearance or destruction of evidence. *Terry v. Ohio*, supra. If the facts fail to show that the person may be armed and dangerous, the police may not make a "pat down." This is so, even if the person is located at a public premise for which the police have a Search Warrant, provided that the person is not named in the Search Warrant. *Ybarra v. Illinois*, 100 S. Ct. 338 (1979). The facts and circumstances at the time and place of arrest of petitioner did not reasonably indicate that he either had or was preparing to commit a crime and therefore, failed to provide the necessary probable cause for the officers to detain petitioner even for investigative purposes. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Cortez and Hernandez-Loera*, 101 S. Ct. 690 (1981). The inarticulate hunch suspicion or the good faith of an arresting officer is insufficient to constitute probable cause to stop and detain a person for investigation. *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968); *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223 (1964).

III.

DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT OF COMPULSORY PROCESS.

As the trial of the petitioner, Perfecto Socorro Munoz, and his co-defendant, Maximo Garcia, was nearing an end, if was announced by co-defendant's trial counsel, that an agreement had been reached between co-defendant and the United States Government. The essence of the plea bargain agreement was that co-defendant would plead guilty to Count II of the Indictment (Possession Count) only after both sides had closed their cases,

in order to prevent co-defendant from being called as a witness for petitioner.

Co-defendant was, in fact, re-arraigned and entered a plea of guilty to Count II of the Indictment (Possession Count). There is no question but that the plea bargain agreement had been made in such a way as to intentionally prevent the petitioner in this case from calling his co-defendant as a witness in his behalf and thereby deprive him of the testimony of co-defendant. The Sixth Amendment to the United States Constitution guarantees an accused in all federal criminal prosecutions the unconditional right to have compulsory process for obtaining witnesses in his favor.

Under the Sixth Amendment right of compulsory process, a defendant has a general right to place on the stand any witness who is physically and mentally capable of testifying to events that the witness has personally observed and whose testimony will be relevant and material to the defense. *Washington v. Texas*, (1967) 388 U.S. 14, 18 L. Ed. 2d 1019, 87 Ct 1920.

Furthermore, under the Sixth Amendment guaranty to subpoena witnesses favorable to a defendant, a defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense. *United States v. Calzada*, (1978, CA7 Hl) 579 F.2d 1358, *cert. dismd.*, 439 U.S. 920, 58 L. Ed. 2d 266, 99 S. Ct. 294; *United States v. Mendez-Rodriguez*, (1971, CA9 Cal) 450 F.2d 1.

Although a defendant has a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice, *Cool v. United States*, (1972) 409 U.S. 100, 34 L. Ed. 2d 335, 93 S. Ct. 354, a valid claim of privilege against self-incrimination under the Fifth Amendment takes precedence over the Sixth Amendment right

to compulsory process. *United States v. Turkish*, (1980, CA2 NY) 623 F.2d 769, 80-2 USTC ¶9478, *cert. den.*, 449 U.S. 1077, 66 L. Ed. 2d 800, 101 S. Ct. 856; *United States v. Trejo-Zambrano*, (1978, CA9 Cal) 582 F.2d 460, *cert. den.*, 439 U.S. 1005, 58 L. Ed. 2d 682, 99 S. Ct. 618. Thus, a defendant may not, under the color of the Sixth Amendment right to compulsory process, compel an accomplice to take the stand in the jury's presence and testify when the defendant knows that the accomplice intends to assert the Fifth Amendment privilege, *United States v. Bolts*, (1977, CA 5 Tex) 558 F.2d 316, *cert. den.*, 434 U.S. 930, 54 L. Ed. 2d 290, 98 S. Ct. 417 and *cert. den.*, 439 U.S. 898, 58 L. Ed. 2d 246, 99 S. Ct. 262, nor is the government required to grant use immunity on demand whenever a defendant wishes to call a co-defendant, *United States v. Alessio*, (1976, CA9 Cal) 528 F.2d 1079, *cert. den.*, 426 U.S. 948, 49 L. Ed. 2d 1184, 96 S. Ct. 3167, *reh. den.*, 429 U.S. 873, 50 L. Ed. 2d 156, 97 S. Ct. 193, or a witness who pleads the Fifth Amendment. *United States v. Turkish*, (1980, CA2 NY) 623 F.2d 769, 80-2 USTC ¶9478, *cert. den.*, 449 U.S. 1077 66 L. Ed. 2d 800 101 S. Ct. 856. *United States v. Klauber*, (1979 CA4 Md) 611 F.2d 512, *cert. den.*, 446 U.S. 908, 64 L. Ed. 2d 261, 100 S. Ct. 1835. But if the government reaches a plea bargain with the witness, the court may not refuse to compel testimony by the witness concerning events to which he has pled guilty. *United States v. Pardo*, (1980) 204 App DC 263, 636 F.2d 535.

The procedural timing of the plea bargain agreement between the United States Government on the one hand and the defense counsel for co-defendant on the other, should not transcend or negate the constitutional mandate of the Sixth Amendment which insures and guarantees the right to all accused " . . . . . to have compulsory process for obtaining witnesses in his favor . . . . ."

IV.

DENIAL OF THE PETITIONER'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

A. The Sentencing of Co-Defendant.

Petitioner's co-defendant in the trial court was sentenced on the 20th day of June, 1991. At the time of his sentencing, he related to the Honorable Judge Edward C. Prado, amongst other matters, the following: 1) That the marijuana found at his house at 9367 Valley Bend, San Antonio, Texas on or about December 26, 1990 was his marijuana and that none of the marijuana belonged to petitioner; 2) That petitioner was only giving him a ride to his residence; 3) That the notebook page containing the numbers, which was alleged by the United States Government to be the corresponding weights of the marijuana bundles found inside the residence, along with traces of cocaine had been placed in the bank bag belonging to petitioner by him and were also his and that petitioner had nothing to do with them and that petitioner was unaware that they were in the bank bag.

B. Co-Defendant Relates to Petitioner What his Testimony Would have been had he been able to Testify at the Trial.

On May 14, 1991 subsequent to the conclusion of the trial petitioner was contacted by co-defendant, who related to petitioner what his (co-defendant's) testimony would have been had he testified in the trial of the case. The information relayed to petitioner was essentially the same information already previously given to his Honor Edward C. Prado during the time of sentencing of co-defendant.

C. The Filing of the Motion for New Trial Based on Newly Discovered Evidence.

The motion for new trial based on newly discovered evidence was filed by petitioner on the 28th day of June, 1991. In lieu of attaching an affidavit from co-defendant and in view of the fact that the same statements had already been made to the Honorable Judge Edward C. Prado in open court, petitioner attached his own affidavit setting forth in detail what co-defendant had stated to him. In addition thereto, it was also made known to the court that co-defendant would be willing to testify to the information he related to the court.

D. The Order Overruling the Motion for New Trial Based on Newly Discovered Evidence.

The court's order overruling the motion for new trial based on newly discovered evidence was signed on July 11, 1991. In so holding, the court set forth certain reasons in its order which formed the basis for the court's ruling, *i.e.*

Reason No. 1

The first reason cited by the trial court and approved by the Fifth Circuit Court of Appeals in overruling petitioner's motion for new trial was that "Given the circumstances and timing of the statements and having observed co-defendant Garcia make such statements at his sentencing hearing on June 20, 1991, the Court finds that such statements do not constitute 'newly discovered evidence' meriting a new trial. The information contained in the statements made by co-defendant Garcia were were clearly known to Defendant Munoz during trial, and from Munoz's trial testimony, it is clear that Munoz knew about the information prior to trial. Exculpatory statements made by a co-defendant following conviction are not newly discovered

evidence." In so ruling, the trial court failed to observe that, regardless of what petitioner knew or did not know during the course of the trial, the testimony of his co-defendant was totally unavailable to him because of co-defendant's Fifth Amendment right not to testify. As a matter of fact, the plea bargain arrangement which co-defendant made with the United States Government was constructed in such a way that petitioner was effectively deprived and denied of the use of his co-defendant's testimony.

Reason No. 2

The second reason cited by the trial court and approved by the Fifth Circuit Court of Appeals in overruling petitioner's motion for new trial based on newly discovered evidence was that "The Court further finds that Munoz has failed even to establish that GARCIA would so testify in his favor if called as a witness at a new trial." Additionally, the court observed that "Because Defendant MUNOZ has not satisfactorily shown that GARCIA would testify in accordance with MUNOZ's affidavit if called to testify, MUNOZ has failed to establish that a new trial would produce a different result." In so doing the court totally set aside the statement that co-defendant made to petitioner that in the event of a new trial he would testify in favor of petitioner.

Generally, a motion for new trial based upon the ground of newly discovered evidence must meet the following requirements: 1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, that is, discovered after trial; 2) The motion must allege facts from which the court may infer that the failure to learn of the evidence was not due to lack of diligence on the part of the defendant; 3) The evidence relied on must be material to the issues involved, not merely cumulative or impeaching; and 4) The evidence must be such as, on new trial, would probably produce acquittal. *United States v. Pappas*, (1979),

CA 7 Ill) 602 F.2d 131, *cert. den.*, 444 U.S. 949, 62 L. Ed. 2d 319, 100 S. Ct. 421. In the case at bar, even assuming arguendo, that petitioner knew of the existence of the testimony of his co-defendant before or during the course of the trial, he, nonetheless, did not have access and/or compulsory process for obtaining such testimony because of his co-defendant's claim of the Fifth Amendment. There was no degree of diligence humanly possible that would have resulted in utilizing the testimony of co-defendant during the course of the trial. It is apparent from a study of the facts and circumstances surrounding co-defendant's structuring of the plea bargain agreement which he entered into at the end of the trial, that the U.S. Government and co-defendant's defense counsel intentionally and purposefully deprived petitioner of access to a witness who would otherwise have been available to testify but for the timing of the plea bargain agreement. Reasonable minds would not differ that, assuming the testimony of co-defendant during the course of the trial, petitioner would have been acquitted of all charges. Petitioner contends that this newly available evidence is, indeed, newly discovered evidence, and petitioner should have been able to rely on the Sixth Amendment to the United States Constitution for the purpose of obtaining the compulsory testimony of his co-defendant. A denial of this right, by virtue of the conduct of the United States Government and co-defendant's defense counsel, is a mockery of the basic tenets and protections afforded by the Sixth Amendment.

SUMMARY OF ARGUMENT

Petitioner, Perfecto Socorro Munoz, agrees with the well settled proposition of law set forth in *Ybarra v. Illinois*, 444 U.S. 85, that officers executing a Search Warrant of a particular premises may not search a person found on the premises absent individualized probable cause. However, the Fifth Circuit Court of Appeals erred in ascertaining and determining that the "individualized probable cause," needed under *Ybarra* was

provided by the *in camera* interview of the Confidential Informant conducted by the trial court. This conclusion, out of necessity, would demand that the information relayed by the Confidential Informant to the trial judge in their *in camera* interview was, in fact, also provided to the Federal Agents prior to the issuance of the Search Warrant and/or at the very least, given to the Federal Agents for their consideration. This did not occur. The record before the Fifth Circuit Court of Appeals establishes quite the contrary, that is, that the Confidential Informant did not provide the Federal Agents with ANY INFORMATION (emphasis ours) on any criminal wrongdoing or involvement on the part of petitioner either before the Search Warrant was obtained or while it was being executed. Additionally, petitioner, at the time of his arrest by the Federal Agents, did not provide any independent reason or basis for his arrest and search to the Federal Agents. The information available to the Federal Agents at the time that they procured the Search Warrant in this cause, was the very same information made available to Guillermo Guerra, the investigator for the San Antonio, Bexar County, Texas District Attorney's office who had been assigned to the Drug Enforcement Task Force and thus attached to the Federal Agents in this cause. He is the only individual who actually dealt with, spoke with and met with the Confidential Informant. It was this very same information which was passed on to Officer David Ambrose who executed the supporting affidavit for the issuance of the Search Warrant in this case. Therefore, if in fact, "individualized probable cause," did exist, it must have existed and passed on to the agents before they obtained the Search Warrant. The trial record shows a complete absence of any such information having been passed on to the agents concerning and regarding any criminal activity by petitioner. The following excerpts indicate the totality of the information passed on to Officer Guerra by the Confidential Informant, to-wit:

1) Officer Guerra testified that the Confidential Informer

had previously been arrested, charged and indicted for a criminal offense for which he was placed on probation.

2) It was during the pendency of this criminal charge against the Confidential Informer, that the information, which ultimately formed the basis for the Search Warrant in this case, was provided to Officer Guerra.

3) Officer Guerra testified that the only information which the Confidential Informer had provided was with regards to co-defendant, Maximo Garcia, and only on this one instance.

4) Previous information which Officer Guerra attributed to the Confidential Informer which had proved to be reliable in the past, was the address of co-defendant, his telephone number and the fact that he was born in Mexico.

5) Additionally, Officer Guerra stated that the Confidential Informer had advised him that within 72 hours prior to December 26, 1990 he had seen, inside the residence of co-defendant located at 9367 Valley Bend, large quantities of marijuana.

6) The Confidential Informer advised Guillermo Guerra that co-defendant was going out of town for the Christmas Holidays but would be returning to his residence at some point on Wednesday, December 26, 1990.

7) Officer Guerra passed on this information to Officer David Ambrose, an Agent with the Drug Enforcement Administration in San Antonio, Texas and Officer Ambrose, in turn, swore to the affidavit which ultimately formed the basis for the application of the Search Warrant. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT, THE APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT, AND SEARCH WARRANT ARE NOT DIRECTED TO PETITIONER,

PERFECTO SOCORRO MUNOZ. BUT ARE DIRECTED SOLELY AT THE RESIDENCE OF CO-DEFENDANT AND THE PERSON OF CO-DEFENDANT.

Consequently, if the Confidential Informer relayed more information to the trial judge in their *in camera* meeting than he provided the Federal Agents prior to the issuance of the Search Warrant this still certainly could not replace the "individualized probable cause," needed under *Ybarra*. *Ybarra* does not permit the retroactive reconstruction and/or substitution of probable cause. The Federal Agents in this case did not have any legal reason, basis or articulable facts which justified their arrest and subsequent search of petitioner.

Petitioner and his co-defendant were tried jointly. Co-defendant entered a negotiated plea of guilty after the case was closed in order to preserve his Fifth Amendment right not to incriminate himself. Petitioner was aware that in the event that co-defendant, if called to testify on his behalf, would invoke his Fifth Amendment rights. There was no procedural vehicle which would have allowed the petitioner to call the co-defendant to testify in his behalf. All defendants have a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice. *Cool v. United States*, (1972) 409 U.S. 100, 34 L. Ed. 2d 335, 93 S. Ct. 354. However, a valid claim of privilege against self-incrimination under the Fifth Amendment is superior to the Sixth Amendment right to compulsory process. *United States v. Trejo-Zambrano*, (1978, CA 9 Cal) 582 F.2d 460, *cert. den.*, 439 U.S. 1005, 58 L. Ed. 2d 682, 99 S. Ct. 618. Moreover, the petitioner was prohibited by law from even attempting to call his co-defendant to the stand to testify on his behalf because he was and had been made aware of the fact that this co-defendant would, if called, invoke the Fifth Amendment privilege. Any effort by the petitioner to call his co-defendant to testify, would run contra to the holding in *United States v. Bolts*, (1977, CA 5 Tex) 558

F.2d 316, *cert. den.*, 434 U.S. 930, 54 L. Ed. 2d 290, 98 S. Ct. 417 and *cert. den.*, 439 U.S. 898, 58 L. Ed. 2d 246, 99 S. Ct. 262 and its progeny of cases holding that a defendant may not, under the color of the Sixth Amendment right to compulsory process, compel an accomplice to take the stand in the jury's presence and testify when the defendant knows that the accomplice intends to assert the Fifth Amendment privilege. Furthermore, any efforts to re-open the case to present evidence of his co-defendant's guilty plea would be futile because just as the government is prohibited from introducing a plea of guilty by one co-conspirator against another conspirator, so would a conspirator be prohibited from introducing the same guilty plea in his favor since the plea of guilty would be pure hearsay and long after the termination of the conspiracy and not in furtherance thereof. *United States v. Harrell*, CA-5, 436 F (2) 606.

The Fifth Circuit Court of Appeals' reasoned judgment in this regard states that "because Appellant knew of Garcia's [Petitioner's Co-Defendant] guilt, he cannot pass even the first step of the newly discovered evidence test." Additionally, this court further held the "Even if he could clear the first hurdle, his failure so call Garcia at trial establishes a lack of diligence on his part." In so holding, this court obviously held that the evidence which was being tendered to the trial court by way of a motion for new trial based on newly discovered evidence was not only material but also would probably result in an acquittal thus meeting two of the four requirements set forth in *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982 (5th Cir. 1989).

The paradox of whether or not evidence was known or unknown during the course of the trial as being dispositive of the issue of whether or not it is newly discovered evidence is magnified by the following set of facts both of which result in the non-availability of the testimony during the course of the trial, *i.e.*, 1) If petitioner was unaware of the nature of the testimony

of his co-defendant, then certainly he would not have been able to use it during the trial; 2) On the other hand, if he knew and was aware of the nature of the favorable testimony of his co-defendant, petitioner still could not have used his testimony because of his co-defendant's Fifth Amendment right. Therefore, regardless of what petitioner knew or did not know during the course of the trial, the testimony of co-defendant was totally unavailable to him because of his co-defendant's Fifth Amendment right not to testify, and hence, could not have been discoverable. Petitioner cannot be faulted for failing to exercise due diligence in procuring the testimony of his co-defendant because he did not have access and/or compulsory process for obtaining such testimony by virtue of his co-defendant's Fifth Amendment claim.

CONCLUSION

For the reasons herein alleged, petitioner prays the Court grant this petition for writ of certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A — THE PUBLISHED OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS DATED MARCH 20, 1992

UNITED STATES of America,

Plaintiff-Appellee,

v.

Perfecto Socoro MUNOZ, a/k/a
Chito, Defendant-Appellant.

No. 91-5704.

United States Court of Appeals,
Fifth Circuit.

March 20, 1992

Defendant was convicted in the United States District Court for the Western District of Texas, Edward C. Prado, J., of possession with intent to distribute cocaine and conspiracy to distribute marijuana, and he appealed. The Court of Appeals, Duhe', J., held that: (1) there was probable cause to arrest defendant; (2) evidence was sufficient to sustain the convictions; and (3) defendant was not deprived of his right to call witness when codefendant agreed during trial to plead guilty at the end of trial.

Affirmed.

1. Criminal Law 1158(4)

When reviewing district court's suppression ruling, Court of Appeals accepts trial judge's factual findings unless they are clearly

erroneous or influenced by incorrect view of law, and views evidence and construes all inferences in light most favorable to Government.

2. Searches and Seizures 148

Officers executing search warrant for particular premises may not search person found on premises absent individualized probable cause.

3. Criminal Law 700(10)

Codefendant's agreement, made during trial, to plead guilty at end of trial did not deprive defendant of his right to call witness in his own defense where he made no attempt to call codefendant as witness and plea agreement did not indicate that Government attempted to discourage or prevent codefendant from testifying. U.S.C.A. Const.Amend. 6.

4. Criminal Law 938(1)

To prevail on motion for new trial based on newly discovered evidence, defendant must show that evidence is in fact newly discovered and was unknown to him at trial, that evidence is material and not merely cumulative or impeaching, that evidence would probably produce an acquittal, and that failure to discover evidence was not due to defendant's lack of diligence.

5. Criminal Law 938(3)

Because defendant knew of codefendant's guilt during trial, codefendant's testimony was not newly discovered evidence even though codefendant did not plead gulty until end of trial, where

defendant made no effort to call codefendant at trial.

6. Drugs and Narcotics 73

Elements of possession with intent to distribute cocaine are in knowing possession with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

7. Drugs and Narcotics 73, 107

Proof of intent to distribute does not require presence of certain minimum quantity of controlled substance, and proof of intent to distribute may be inferred from presence of distribution paraphernalia or large quantities of cash, or from value and quality of substance. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

8. Drugs and Narcotics 123(2)

Defendant's conviction for possession of cocaine with intent to distribute was supported by evidence that he was found with very high grade of cocaine suitable for further dilution, and that he had $1,000 and sheet listing weight of large amounts of marijuana, and by his denial of using marijuana for personal consumption. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

9. Conspiracy 28(3)

Elements of conspiracy to distribute marijuana are existence of agreement between two or more people to violate narcotics laws, defendant's knowledge of intent to commit conspiracy, and

participation in conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

10. Conspiracy 47(12)

Defendant's conviction for conspiracy to distribute marijuana was supported by evidence that police found in defendant's possession sheet of paper listing weight of marijuana found in codefendant's home, that defendant's brother knew where and when to call defendant on day that he was arrested in codefendant's home, and that, when defendant's brother called, defendant attempted to warn his brother about "the narcs." Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, DUHE ' AND BARKSDALE, Circuit Judges.

DUHE ', Circuit Judge.

Appellant, Perfecto Socoro Munoz, seeks reversal of his convictions of possession with intent to distribute cocaine and conspiracy to distribute marijuana. Appellant challenges the denials of his motion to suppress and his motion for a new trial and the sufficiency of the evidence. Finding no merit in his arguments, we affirm.

Background

In December 1990, San Antonio police received a tip from

a confidential informant that Maximo Garcia was storing large quantities of marijuana in his San Antonio home. Based on the information supplied by the informant, the police applied for a search warrant of Garcia's residence, supporting their application with the affidavit of Officer David Ambrose. Ambrose's affidavit indicated that the informant had revealed that within the prior seventy-two hours, he had seen several hundred pounds of marijuana in Garcia's house, that Garcia would be out of town until December 26, and that the marijuana would be removed upon Garcia's return. The magistrate issued a search warrant for the property on the strength of this affidavit. Neither the warrant nor the affidavit supporting it mentioned Perfecto Soroco Munoz by name.

On December 26, with search warrant in hand, the police established surveillance of Garcia's home. That afternoon, Garcia and Appellant arrived in Appellant's car. As Garcia and Appellant got out of the car, the police stopped and frisked both men. Appellant was carrying a zippered bag in which the officers found, among other things, a credit card and bill bearing Appellant's name, 10.5 grams of cocaine, $1,000 in cash, and a piece of notebook paper with numbers listed on it. A search of the house revealed forty-five bundles of marijuana labeled by weight with numbers corresponding to those listed on the paper found in Appellant's bag.

While the officers searched the house, Appellant and Garcia waited in the kitchen. During the search, Appellant's brother telephoned the house. When Appellant was informed that his brother was on the line, he shouted towards the telephone, in Spanish, "The narcs. The narcs are here."

At trial Appellant claimed that he had no knowledge of the

contents of the home or the zippered bag. Appellant moved to suppress the contents of the bag, arguing that because the police lacked probable cause to arrest him, the search incident to his arrest was unlawful. To determine whether the police had probable cause to arrest Appellant, the district court held an *in camera* interview with the informant. Apparently satisfied that the informant had provided the officers with information establishing probable cause to arrest Appellant, the court denied the motion to suppress. To protect the identity of the informant, it declined to state its reasons.

Appellant and Garcia were tried jointly, but after Appellant testified, Garcia reached a plea agreement with the Government. To preserve his Fifth Amendment rights, however, Garcia did not enter his guilty plea until the case was closed. Appellant did not attempt to call Garcia as a witness during trial. Nor did he attempt to reopen the case to present the evidence of Garcia's guilty plea. The jury found Appellant guilty.

At sentencing, Garcia stated that Appellant held no proprietary interest in the contents of the bag or the house. In light of this statement, Appellant moved for new trial based on newly discovered testimony. The district court denied the motion.

In this Court, Appellant offers four arguments for the reversal of his conviction. First, he contends that the district court should have granted his motion to suppress because the police lacked probable cause to arrest and search him. Second, he argues that the announcement of Garcia's plea agreement at the end of the trial violated his Sixth Amendment right to compulsory process. Appellant's third point of error is the denial of his motion for new trial based on newly discovered evidence. Finally, Appellant disputes the sufficiency of the evidence supporting both the cocaine and marijuana verdicts.

Appendix A

Analysis

Motion to Suppress

[1] When reviewing a district court's suppression ruling, we accept the trial judge's factual findings unless they are "clearly erroneous or influenced by an incorrect view of the law." *United States v. Lanford*, 838 F.2d 1351, 1354 (5th Cir. 1988). We view the evidence and construe all inferences in the light most favorable to the Government. *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984).

[2] Officers executing a search warrant of a particular premises may not search a person found on the premises absent individualized probable cause. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979). We have carefully reviewed the transcript of the *in camera* questioning of the confidential informant, and find that, before the issuance of the warrant, the informant provided the police with ample information to establish probable cause to arrest and search Perfecto Socoro Munoz as well as Maximo Garcia. The district court, thus, did not err in permitting the introduction of evidence discovered incident to Appellant's arrest.

Sixth Amendment

[3] Appellant contends that Garcia's agreement to plead guilty at the end of trial deprived him of the opportunity to call Garcia as a witness in his defense. We find no merit in this argument. Appellant made no attempt to call Garcia as a witness. Furthermore, Garcia's plea agreement does not evidence an effort by the Government to discourage or prevent Garcia from testifying. Absent such an indication, Appellant cannot prevail on this claim.

Appendix A

See United States v. Hatch, 926 F.2d 387, 395 (5th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 126, 116 L.Ed.2d 93 (1991).

New Trial Motion

[4] We review the district court's ruling on a motion for new trial for an abuse of discretion. *Jones v. Wal-Mart Stores Inc.*, 870 F.2d 982, 986 (5th Cir. 1989). To prevail on a motion for new trial based on newly discovered evidence, a defendant must show: (1) that the evidence is in fact newly discovered and was unknown to him at trial; (2) that the evidence is material and not merely cumulative or impeaching; (3) that the evidence would probably produce an acquittal; and (4) that the failure to discover the evidence was not due to defendant's lack of diligence. *United States v. Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991).

[5] Although Garcia's testimony arguably did not become available to Appellant until the end of trial, Appellant has failed to show that the evidence was newly discovered. *See United States v. Metz*, 652 F.2d 478, 480 (5th Cir. 1981). Indeed, according to Appellant's version of the events, Garcia was responsible for the criminal activity. Because Appellant knew of Garcia's guilt, he cannot pass even the first step of the newly discovered evidence test. Even if he could clear the first hurdle, his failure to call Garcia at trial establishes a lack of deligence on his part. The district court, therefore, did not abuse its discretion in denying Appellant's motion for new trial.

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence of both his conviction of possession with intent to distribute cocaine and his conviction of conspiracy to distribute marijuana. Viewing the

evidence and inferences that may be drawn from it in the light most favorable to the verdict, we must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Nixon,* 816 F.2d 1022, 1029 (5th Cir. 1987), *cert. denied,* 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

[6-8] The elements of possession with intent to distribute cocaine, a violation of 21 U.S.C. §841(a)(1), are (1) knowing, (2) possession, (3) with intent to distribute.*United States v. Anchondo-Sandoval,* 910 F.2d 1234, 1236 (5th Cir. 1990). Although the amount of cocaine in Appellant's possession was relatively small, proof of intent to distribute does not require the presence of a certain minimum quantity of controlled substance. *United States v. Grizales,* 859 F.2d 442, 446 n. 2 (7th Cir. 1988). Proof of intent to distribute may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance. *See United States v. Robinson,* 870 F.2d 612, 613 (11th Cir. 1989); *United States v. Castellanos,* 731 F.2d 979, 985 (D.C.Cir.1984); *United States v. Glenn,* 667 F.2d 1269, 1272 (9th Cir.1982). Appellant was found with a very high grade of cocaine, suitable for further dilution. He carried this cocaine along with $1,000 and a sheet listing the weight of large amounts of marijuana. Moreover, Appellant denied using cocaine for personal consumption. We find that, based on this evidence, it was reasonable for the jury to infer Appellant possessed the cocaine for distribution purposes.

[9,10] The elements of conspiracy to distribute marijuana, a violation of 21 U.S.C. §846, are (1) the existence of an agreement between two or more people to violate narcotics laws, (2) defendant's knowledge of an intent to join the conspiracy, and

(3) participation in the conspiracy. *United States v. Magee,* 821 F.2d 234, 238-39 (5th Cir.1987). Proof of any element may be by circumstantial evidence. *United States v. Ruiz,* 860 F.2d 615, 617-18 (5th Cir.1988). The evidence supporting the jury's verdict is plentiful. The police found in Appellant's possession a sheet of paper listing the weight of the marijuana found in Garcia's home. Appellant's fingerprints were detected on the paper. Appellant's version of the events—that he and his family were staying in Laredo when Garcia, whom he did not know well, unexpectedly requested a ride into San Antonio—is contradicted by a bill in Appellant's name from a Laredo hotel indicating that two adults (and no children) stayed there. That Appellant's brother knew where and when to call Appellant on the day of the arrest as well as Appellant's attempt to warn his brother about "narcs" further tends to show his complicity in Garcia's venture. The verdict of the jury with respect to the marijuana count was reasonable.

The conviction of Appellant, therefore, is AFFIRMED.

APPENDIX B — THE AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION FILED JULY 12, 1991

UNITED STATES DISTRICT COURT
Western District of Texas
San Antonio Division

Case Number SA-91-CR-4 (2)

UNITED STATES OF AMERICA

v.

PERFECTO SOCORRO MUNOZ
a/k/a "Chito"

Defendant.

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, PERFECTO SOCORRO MUNOZ, was represented by Julio A. Garcia.

The defendant was found guilty on count(s) One and Three by a jury verdict on April 04, 1991 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offenses	Count Number(s)

Appendix B

Title & Section (continued)	Nature of Offense	Date of Offenses	Count Number(s)
21 USC 846	Conspiracy to distribute marijuana contrary to 21 USC 841(A)(1).	12/26/90	One
21 USC 841(a)(1)	Possession with intent to distribute Cocaine.	12/26/90	Three

As pronounced on June 21, 1991, the defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) One and Three, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed ?? this Judgment are fully paid.

Signed this the 12th day of July, 1991.

s/ Edward C. Prado
EDWARD C. PARDO
United States District Judge

Appendix B

Defendant's SSAN: 453-08-1410
Defendant's Date of Birth: June 21, 1956
Defendant's address: 3007 Napalier, Laredo, Texas 78040

APPENDIX C — THE APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT

CASE NUMBER: SA90-534M

In the Matter of the Search of
Name address or brief description of person, property or premises to be searched)
SINGLE FAMILY WOOD STRUCTURED RESIDENCE, WHICH IS LOCATED AT 9367 VALLEY BEND, ANTONIO, TEXAS. (AS MORE FULLY DESCRIBED & ATTACHMENT "A", PROPERTY DESCRIPTION, HERETO ATTACHED.)

I DAVID AMBROSE being duly sworn depose and say:

I am a(n) Official Title SPECIAL AGENT WITH THE DRUG ENFORCEMENT ADMINISTRATION and have reason to believe on the property or premises known as
SINGLE FAMILY WOOD STRUCTURED RESIDENCE, WHICH IS LOCATED AT 9367 VALLEY BEND, ANTONIO, TEXAS. (AS MORE FULLY DESCRIBED IN ATTACHMENT "A", PROPERTY DESCRIPTION, HERETO ATTACHED.)

The WESTERN District of TEXAS

there is now concealed a certain property, namely describe the person or property to be seized)

CONTRABAND, I.E., MARIJUANA, ETC., AND OTHER

Appendix C

FRUITS OF ILLEGAL ACTIVITY. (AS MORE FULLY DESCRIBED IN ATTACHMENT "B", HERETO ATTACHED.)

which is state one or more cases to search and seizure set forth under Rule illegible of the Federal Rules of Criminal Procedure.

EVIDENCE AND CONTRABAND

Concerning a violation of Title 21 United States code, Section(s) 841(a)(1) The facts to support a finding of Probable Cause are as follows:

ATTACHMENT "C", AFFIDAVIT OF SPECIAL AGENT DAVID AMBROSE, DEA, HERETO ATTACHED.

Copy of the originals, I certify
Clerk's, U.S. District Court
s/ illegible
JAN 18 1991 Deputy

Continued on the attached sheet and made a part hereof.

s/ Illegible
Signature of Affiant

Sworn to before me, and subscribed in my presence

DECEMBER 26, 1990 at SAN ANTONIO, TEXAS

U.S. MAGISTRATE JUDGE ROBERT B. O'CONNOR
Name and Title of Judicial Officer
s/ illegible
Signature of Judicial Officer

Appendix C

ATTACHMENT A
PROPERTY DESCRIPTION
Garcia Residence

One single family wood structured residence, the wood structure is yellow in color, with a light brown brick veneer on the front portion of the house, and blue trim on the front of the house. The house has an attached garage, with the numbers "9367" displayed on the front of the garage. This property is located at 9367 Valley Bend, San Antonio, Texas. In addition to the above-described structure, the property to be searched is to include all other outbuildings on the property, and all persons and vehicles at the location.

ATTACHMENT B
PROPERTY LIST

1. Books, records, receipts, notes, ledgers, airline tickets, bank records, money orders and other papers relating to the transportation, ordering, sale and distribution of illicit controlled substances;

2. Currency, financial instruments, precious metals, jewelry, vehicle registration receipts, property titles, and other items of value and/or proceeds of drug transactions and evidence of items of value and/or proceeds of drug transactions and financial transactions relating to obtaining, transferring, secreting or spending large sums of money made from engaging in illicit controlled substance activities;

3. Telephone and address books or papers which reflect names, addresses and/or telephone numbers for their associates in dealing in illicit controlled substances and persons or entities from whom proceeds of drug transactions or other items of value

have been obtained and in what manner said proceeds are presently maintained;

4. Photographs of individuals, property and illicit controlled substances;

5. Books, records, receipts, notes, identification documents and other papers indicating that the persons listed above are presently using alias of assumed names other than their true names, and are representing themselves to others under assumed or alias names in order to hide and conceal themselves from law enforcement authorities and to disguise their current activities;

6. A quantity of a controlled substance, to wit: marijuana; the above-described items are being utilized in the possession and distribution of controlled substances in violation of 21 U.S.C. §841(a)(1).

ATTACHMENT C
AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

STATE OF TEXAS)
)
COUNTY OF BEXAR)

I, DAVID AMBROSE being duly sworn do hereby depose and state as follows:

This affidavit is submitted in support of an Application for Search Warrant to search the premises described below, being located in Bexar County, Texas. Probable cause to believe certain contraband and other evidence is on such premises is set forth as follows:

Appendix C

I am employed as a Special Agent of the Drug Enforcement Administration (hereinafter "DEA"). I have approximately eight years experience in law enforcement, four of those years as a Special Agent of the DEA.

As a Special Agent of the DEA, I have the responsibility of working with federal and state law enforcement officers in the investigation of violations of state and federal controlled substances laws, including Title 21 of the United States Code.

I have personally participated in this investigation and am thoroughly familiar with the information contained in this affidavit either through personal investigation or through discussions with other law enforcement personnel, including officers and agents of the DEA State and Local Task Force (the "Task Force"). During the past week, officers of the DEA Task Force have received information from a credible and reliable informant who has provided reliable information in the past on numerous occasions ("CI"). This informants' information has proven to be true and correct.

During the week of December 17, 1990, agents of the Task Force received information on several occasions from the CI that Maximo Garcia lives at 9367 Valley Bend, San Antonio, Texas. The CI stated to me that Maximo Garcia was involved in the distribution of marijuana. This information was corroborated by checking utility records for the San Antonio area and discovering that Maximo Garcia is listed as responsible for paying the utilities at such location. The CI also gave a phone number which he believed to be the phone number to the residence. This information was corroborated by checking telephone subscriber information and discovering that this number is registered to the residence at 9367 Valley Bend, San Antonio, Texas, and that Maximo Garcia

Appendix C

is listed as the subscriber of such number. The CI stated that Maximo Garcia stated that the marijuana was brought from Laredo, Texas, and that Maximo Garcia is originaly from Mexico. We corroborated this by checking City of San Antonio records and discovering that Maximo Garcia was born in Mexico City, Mexico. The CI also stated that Maximo Garcia stated he had lived in California at one time. The information was corroborated by checking City of San Antonio records and discovering that Maximo Garcia surrendered his California driver's license in Texas on April 4, 1988.

The CI stated to an officer of the Task Force today, December 26, 1990, that within the last 72 hours the CI had seen inside the residence at 9367 Valley Bend, San Antonio, Texas, large quantities of marijuana, and that it appeared to the CI to be several hundred pounds of marijuana wrapped in several packages with cellophane plastic. Officers know from their experience with this CI that the CI has the ability to recognize marijuana and is familiar with the appearance and the relative quantities of marijuana. The CI stated that Maximo Garcia had indicated he was going out of town for the Christmas holiday, but would be returning to his residence at some point on Wednesday, December 26, 1990, to distribute the marijuana. We do not have information as to the specific time Maximo Garcia will return to the residence, and in fact have checked the house and discovered as of 11:30 a.m. no one had yet returned to the residence. The possibility exists that Maximo Garcia may return during the evening hours. Based upon the information given by the CI that the marijuana would be removed upon his arrival, I request authorization to search the residence during nighttime hours.

I believe there is probable cause to believe that the residence at the address listed above is currently being used by these persons

to store marijuana, ledgers and other evidence of the possession and distribution of marijuana.

Based upon my training, experience, my participation in other narcotic investigations, and my extensive discussions with experienced agents of the DEA and other agencies, I know:

a.) That significant narcotics traffickers who deal in large amounts of marijuana frequently maintain on hand large amounts of U.S. currency in order to maintain and finance their on-going narcotics business;

b.) That narcotics traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, sale and distribution of controlled substances; furthermore, I know that the aforementioned books, records, receipts, notes, ledgers, etc., are generally maintained where the traffickers have ready access to them;

c.) That it is common for significant dealers to secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residences, businesses and automobiles for ready access and to conceal same from law enforcement authorities;

d.) That persons involved in significant drug trafficking conceal in their residences, businesses and automobiles caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry, and other items of value and/or proceeds of drug transactions; and evidence of financial transactions relating to obtaining, transferring, secreting, or spending of large sums of money made from engaging in narcotics trafficking activities;

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e.) That when drug traffickers amass proceeds from the sale of drugs that drug traffickers often attempt to legitimize these profits. In this process, I know that to accomplish these goals, drug traffickers often utilize, including but not limited to, foreign and domestic banks and their attendant services, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporation, and business fronts;

f.) That narcotics traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers for their associates in the trafficking organization;

g.) That drug traffickers take or cause to be taken photographs of them, their associates, their property, and their product. That these traffickers usually maintain these photographs in their possession;

h.) That narcotics traffickers usually keep paraphernalia for packaging, cutting, weighing, and distributing of narcotics; that these praphernalia include but are not limited to, scales, plastic bags, and cutting agents;

i.) That I am aware that the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular trafficking in controlled substances. (Indeed, drug traffickers often have expensive furniture or home furnishings which a search of their residences will reveal;

j.) That I am aware that dealers in narcotics often keep handguns, ammunition, and other weapons in their residences to safeguard supplies of drugs and the fruits of narcotics dealings.

Appendix C

I believe from the information given to me and other information obtained by me and law enforcement officers that probable cause exists to believe that the property described in the attached Exhibit "A", i.e., the residence in Bexar County, Texas described above is being used in connection with the distribution and possession of marijuana, and contain evidence and contraband in connection with the distribution and possession of marijuana, as more fully described in Attachment B — "Property List".

FURTHER AFFIANT SAYETH NOT.

s/ David Ambrose
David Ambrose
Drug Enforcement Administration
Special Agent

Sworn to before me this 26th day of December, 1990.

s/ illegible
United States Magistrate

APPENDIX D — THE SEARCH WARRANT

United States District Court
WESTERN DISTRICT OF TEXAS

SEARCH WARRANT

SA90-534M

In the Matter of the Search of
ONE SINGLE FAMILY WOOD STRUCTURED RESIDENCE, WHICH IS LOCATED AT 9367 VALLEY BEND, SAN ANTONIO, TEXAS. (AS MORE FULLY DESCRIBED IN ATTACHMENT "A", PROPERTY DESCRIPTION, HERETO ATTACHED.)

SPECIAL AGENT
DAVID AMBROSE, DRUG ENFORCEMENT ADMINISTRATION and any Authorized Officer of the United States

Affidavits having been made before me by Affiant: *SPECIAL AGENT DAVID AMBROSE, DRUG ENFORCEMENT ADMINISTRATION* who has reason to believe that on the premises known as:
ONE SINGLE FAMILY WOOD STRUCTURED RESIDENCE, WHICH IS LOCATED AT 9367 VALLEY BEND, SAN ANTONIO, TEXAS. (AS MORE FULLY DESCRIBED IN ATTACHMENT "A", PROPERTY DESCRIPTION, HERETO ATTACHED.)

The *WESTERN* District of *TEXAS* there is now concealed a certain property, namely: (describe the person or property)
CONTRABAND, I.E., MARIJUANA, ETC., AND OTHER FRUITS OF ILLEGAL ACTIVITY. (AS MORE FULLY

Appendix D

DESCRIBED IN ATTACHMENT "B", PROPERTY LIST, HERETO ATTACHED.)

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for issuance of this warrant.

ARE HEREBY COMMENCED to search on or before 1-5-91

A true copy of the original, I certify.
Clerk, U.S. District Court
By: s/ Chin L. Marting
Deputy

DECEMBER 26, 1990 1:45 P at SAN ANTONIO, TEXAS

U.S. MAGISTRATE JUDGE ROBERT B. O'CONNOR

s/ Robert B. O'Connor
ROBERT B. O'CONNOR

Appendix D

ATTACHMENT A
PROPERTY DESCRIPTION
Garcia Residence

One single family wood structured residence, the wood structure is yellow in color, with a light brown brick veneer on the front portion of the house, and blue trim on the front of the house. The house has an attached garage, with the numbers "9367" displayed on the front of the garage. This property is located at 9367 Valley Bend, San Antonio, Texas. In addition to the above-described structure, the property to be searched is to include all other outbuildings on the property, and all persons and vehicles at the location.

Appendix D

ATTACHMENT B

PROPERTY LIST

1. Books, records, receipts, notes, ledgers, airline tickets, bank records, money orders and other papers relating to the transportation, ordering, sale and distribution of illicit controlled substances;

2. Currency, financial instruments, precious metals, jewelry, vehicle registration receipts, property titles, and other items of value and/or proceeds of drug transactions and evidence of items of value and/or proceeds of drug transactions and financial transactions relating to obtaining, transferring, secreting or spending large sums of money made from engaging in illicit controlled substance activities;

3. Telephone and address books or papers which reflect names, addresses and/or telephone numbers for their associates in dealing in illicit controlled substances and persons or entities from whom proceeds of drug transactions or other items of value have been obtained and in what manner said proceeds are presently maintained;

4. Photographs of individuals, property and illicit controlled substances;

5. Books, records, receipts, notes, identification documents and other papers indicating that the persons listed above are presently using alias of assumed names other than their true names, and are representing themselves to others under assumed or alias names in order to hide and conceal themselves from law enforcement authorities and to disguise their current activities;

Appendix D

6. A quantity of a controlled substance, to wit: marijuana; the above-described items are being utilized in the possession and distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1).

Appendix D

RETURN

DATE WARRANT RECEIVED:
12/26/90

DATE AND TIME WARRANT EXECUTED:
12/26/90 4:30 pm

COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH:
Maximo Garcia

INVENTORY MADE IN THE PRESENCE OF:
S/A's JOE LA SOYA, RON ROBINSON DA Inv. Willie Guarra

INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT:
(See attached inventory list contained on DEA-12's)

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

s/ illegible

Subscribed, sworn to, and returned before me this date.

s/ illegible
U.S. Magistrate

12/27/90
Date

Appendix D

RECEIPT FOR CASH OR OTHER ITEMS

DATE:
12/26/90

DIVISION/DISTRICT OFFICE:
SADO

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

Amount or Quantity	Description of Item(s)	Purpose (if Applicable)
1	100lb Accu-weigh Scale	NW Bedroom Closet
(4)	45 square ft. plastic Freezer wrap	" "
1	Box of 30 gal. garbage bags	" "
13	rolls of gray duct tape	" "
2	Utility knives	" "
4	Markers	" "
1	Stick-up pad	" "
45	packages of suspected marijuana wrapped in gray duct tape	NE Bedroom Closet

RECEIVED BY (Signature):
David L. Ambrok S/A

Appendix D

RECEIPT FOR CASH OR OTHER ITEMS

DATE:
12/26/90

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

Amount or Quantity	Description of Item(s)	Purpose (if Applicable)
1	First Interstate Bank Bag w $1,042, white zip lock bag w/white powdery substance, documents, gold colored bracelet $26 currency white jacket/one gold colored bracelet	White Cadillac
1	partial full of Marlboro Lights w/ rolled up one dollar bill further containing white powdery substance	

Appendix D

RECEIPT FOR CASH OR OTHER ITEMS

DATE:
12/26/90

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

Amount or Quantity	Description of Item(s)	Purpose (if Applicable)
1	Smith & Wesson 44 magnum SN N664996, Model 29 (loaded)	Master Bedroom (closet)
1	Wooden Brown box containing misc. papers	Master bedroom (on dresser)
1	Brown Manila Envelope w/misc. papers	" "
1	Virginian 45 cal. Colt (Loaded w/6)	" " under matress

Appendix D

RECEIPT FOR CASH OR OTHER ITEMS

DATE:
12/26/90

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

Amount or Quantity	Description of Item(s)	Purpose (if Applicable)
9	boxes of plastic wrap	Utility Room
2	Plastic bags w/green leafy substance & Zig Zag papers	Kitchen (refrigerator)
—	Clear zip lock plastic bags	Kitchen (pantry)
1	Igloo (green) bottle holder containing sifter, ?? w/white powdery substance	Kitchen (pantry)
1	Salton Hot spot	" "

Appendix D

RECEIPT FOR CASH OR OTHER ITEMS

DATE:
12/26/90

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

Amount or Quantity	Description of Item(s)	Purpose (if Applicable)
1	Gold colored medallion	on Perfecto Munoz

APPENDIX E — THE INDICTMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MAXIMO GARCIA, a/k/a "MAX", and PERFECTO SOCORRO MUNOZ, a/k/a "CHITO",

Defendants.

CRIMINAL NO.

INDICTMENT

[Vio: 21 U.S.C. §846, Conspiracy to Distribute Marijuana; 21 U.S.C. §841(a)(1), Possession with the Intent to Distribute Marijuana, a Schedule I Controlled Substance, and Cocaine, a Schedule II Controlled Substance]

THE GRAND JURY CHARGES:

COUNT ONE
[21 U.S.C. §846]

That beginning on or before December, 1990, the exact date unknown to the Grand Jury, and continuing until December 26, 1990, in the Western District of Texas, Defendants,

MAXIMO GARCIA, a/k/a "MAX", and
PERFECTO SOCORRO MUNOZ, a/k/a "CHITO",

did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other to distribute a quantity of marijuana, a Schedule I Controlled Substance, contrary to Title 21, United States Code, Sections 841(a)(1), and in violation of Title 21, United States Code, Section 846.

COUNT TWO
[21 U.S.C. §841(a)(1)]

That on or about December 26, 1990, in the Western District of Texas, Defendant,

MAXIMO GARCIA, a/k/a "MAX",

did unlawfully, knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE
[21 U.S.C. §841(a)(1)]

That on or about December 26, 1990, in the Western District of Texas, Defendant,

PERFECTO SOCORRO MUNOZ, a/k/a "CHITO",

did unlawfully, knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.
FOREPERSON

Appendix E

RONALD F. EDERER
United States Attorney

By: s/ Michael W. McCrum
MICHAEL W. MCCRUM
Assistant U.S. Attorney

APPENDIX F — MOTION TO SUPPRESS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

VS

PERFECTO SOCORRO MUNOZ, ET AL

CRIMINAL NO. SA-91-CR-4(2)

MOTION TO SUPPRESS EVIDENCE
OBTAINED BY UNLAWFUL SEARCH AND SEIZURE

TO THE HONORABLE EDWARD C. PRADO, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

NOW COMES PERFECTO SOCORRO MUNOZ, Defendant in the above styled and numbered cause, and moves that the court suppress certain evidence obtained by an unlawful search and seizure, and as a basis for said motion would show the Court as follows:

I.

On or about the 26th day of December, 1990, Special Agents of the Drug Enforcement Administration arrested Defendant and conducted a search of Defendant's person and of the automobile in which Defendant was the driver at the time of said arrest. But prior to this Defendant's arrest, the DEA Agents entered the co-defendant's residence and conducted a search of the co-defendant's

residence and all outer buildings on the property, and thereafter waited outside for the passenger in the Defendant's car to return home and then served him with a search warrant. The DEA Agents failed to inform the Defendant that they had priorly conducted a search of the residence and all other outbuildings on the property. As a result of that illegal search, certain items of contraband were allegedly seized after the Defendant's arrest, the alleged possession of which forms the basis of the offenses charged in the indictment.

II.

This search and seizure was conducted in violation of the rights secured to Defendant by the Fourth Amendment to the United States Constitution, in that:

1. There was no probable cause for Defendant's arrest. Thus, the arrest was unlawful, and any search or seizure made incident thereto was likewise unlawful.

2. The search was conducted prior to serving the Defendant with the search warrant and prior to his arrest, and without the attendant exigent circumstances to justify a search and seizure. The DEA Agents failed to inform the Defendant that they had priorly conducted the search.

3. The search and seizure was beyond the permissible scope of a warrantless search and seizure incident to an arrest.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the Court conduct a hearing, and thereafter suppress the following:

1. All testimony concerning Defendant's arrest and the

search and seizure incident thereto;

2. All testimony concerning statements allegedly made by Defendant while in custody;

3. All tangible items or evidence allegedly seized incident to Defendant's arrest; and,

4. All testimony concerning tangible items of evidence allegedly seized incident to Defendant's arrest.

Respectfully Submitted,

s/ Fred Rodriguez
FRED G. RODRIGUEZ, ATTORNEY
State Bar No. 17145000
2200 Tower Life Bldg.
San Antonio, Texas 78205
(512, 223 2641)
Fax No. 512, 223 2714
ATTORNEY FOR PERFECTO SOCORRO MUNOZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Motion To Suppress Evidence Obtained By Unlawful Search and Seizure was mailed by certified mail, return receipt requested on Mr. Michael W. McCrum, Assistant United States Attorney, 727 E. Durango, Suite A601, San Antonio, Texas 78206, on March 8, 1991.

s/ Fred Rodriguez
FRED G. RODRIGUEZ

APPENDIX G — MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

PERFECTO SOCORRO MUNOZ,

Defendant.

CRIMINAL NO. SA-91-CR-4(2)

MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

PERFECTO SOCORRO MUNOZ, the Defendant in the above-entitled action, by his undersigned attorney, moves the court for a new trial herein.

This motion is made on the grounds that, subsequent to the conclusion of the trial, Defendant discovered new evidence, which evidence is not merely cumulative or impeaching, but is relevant and material to the issues involved in this case, and is of such a character that it would probably result in a different verdict at a new trial, and which evidence the Defendant could not in the exercise of due diligence have used or discovered before the trial.

Appendix G

This motion is based on all the files, records and statements made by MAXIMO GARCIA exculpating PERFECTO SOCORRO MUNOZ in open court before his Honor Judge Edward C. Prado on the 20th day of June, 1991, of this action, on the affidavit of PERFECTO SOCORRO MUNOZ, attached hereto and marked Exhibit "A", setting forth the nature of the newly discovered evidence and the manner of its discovery, and on any evidence that may be produced at the hearing hereon.

Dated June 28, 1991.

Respectfully submitted,

s/ Julio A. Garcia
JULIO A. GARCIA
2602 ARKANSAS
LAREDO, TEXAS 78043
(512) 724-1123
U.S. DISTRICT NO. 5211
ATTORNEY FOR DEFENDANT
PERFECTO SOCORRO MUNOZ

Appendix G

STATE OF TEXAS §

COUNTY OF WEBB §

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL — NEWLY DISCOVERED EVIDENCE

I, PERFECTO SOCORRO MUNOZ, being duly sworn, state:

1. I am the Defendant in the above-entitled action.

2. I was charged in this case by indictment with violation of 21 U.S.C. §846(a)(1). Trial commenced on April 1, 1991, and continued on April 3, 1991 and April 4, 1991 before the United States District Court for the Western District of Texas with a jury, and I was found guilty on Count I and Count III on April 4, 1991.

3. The essence of the government's case against me was that members of the Drug Enforcement Administration working with a state and local task force received information that Maximo Garcia was involved in the distribution of large amounts of marijuana. Mr. Maximo Garcia's residence located at 9367 Valley Bend, San Antonio, Texas was identified as a temporary storage place for marijuana prior to its distribution. On December 26, 1990, Mr. Maximo Garcia and Mr. Perfecto Munoz arrived at Mr. Garcia's residence after returning from an out of town trip and were arrested by law enforcement officers. A search of Mr. Garcia's residence resulted in the seizure of 322.8 pounds of marijuana wrapped in several packages with cellophane plastic. Each of the packages contained a notation which appeared to represent the approximate weight. Two handguns were seized from

the master bedroom of the residence. A Smith & Wesson 44 Magnum handgun loaded with five rounds of ammunition was found inside a closet and a Virginian .45 caliber Colt loaded with six rounds of ammunition was discovered underneath the mattress. Mr. Munoz was arrested as he exited his vehicle carrying a bank bag containing 36.8 grams of cocaine, $1,000.00 in cash and a sheet of paper with notations of numbers that allegedly corresponded with the notations of weight on each package of marijuana seized inside Mr. Garcia's residence.

The government relied heavily on the testimony of David Ambrose, Special Agent, Drug Enforcement Administration, Robbie Robinson, Special Agent, Drug Enforcement Administration and Guillermo B. (Willie) Guerra, Investigator, Bexar County District Attorney's Office, who were the only witnesses who testified to my presence outside the residence of Co-Defendant, Maximo Garcia, at the scene and my alleged involvement in this matter.

4. At the trial of the case, I testified in my own defense. Essentially, my testimony was to the effect that I had no knowledge of the marijuana in Maximo Garcia's residence and that I did not have possession, actual or constructive, of the marijuana. I also testified that I had never agreed with Maximo Garcia to violate the law by attempting and/or agreeing to distribute such marijuana and consequently, that a conspiracy never existed. I further testified that Maximo Garcia placed the cocaine, and "weight" notations in my bank bag while traveling from Laredo to Maximo Garcia's residence. I have, at all times, maintained my innocence in this matter.

5. Maximo Garcia was a Co-Defendant in the trial with me and stood charged, accused and indicted of virtually the same

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violations of law which I was charged with. Maximo Garcia did not testify during the course of the trial and entered a plea of guilty to the charge of possession with intent to distribute after the government finished presenting their case.

6. On May 14, 1991, subsequent to the conclusion of the trial herein, I was contacted by Maximo Garcia, who related certain information to me regarding his testimony concerning this case. I was totally unaware of what his testimony was until he contacted me on that date.

7. The information given me by Maximo Garcia directly contradicts and repudiates the testimony given at trial by the Drug Enforcement Administration Agents and Guillermo B. (Willie) Guerra. This information is not merely cumulative or impeaching, but is material and relevant to the major issue in this case, namely, the identification of the Defendant as the perpetrator of the alleged crime and/or a conspirator in this case. The new evidence strongly indicates that Guillermo B. (Willie) Guerra and Drug Enforcement Agents gave contradictory statements under oat

8. Maximo Garcia stated to me as follows:

"a. The marijuana found at my house at 9367 Valley Bend, San Antonio, Texas, on or about December 26, 1990 was my marijuana and none of the marijuana belonged to Perfecto Socoro Munoz also known as "Chito" hereinafter referred to as "Chito".

b. I had met Chito in Laredo and Chito was bringing me home to San Antonio, Texas when I was arrested at my house.

c. Prior to arriving in San Antonio on December 26th,

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I had placed a page of a notebook paper and some traces of cocaine in a bag belonging to Chito. The page of notebook paper and the traces of cocaine also belonged to me."

9. Maximo Garcia has informed me that, in the event of a new trial, he would be willing to testify to the information hereinbefore set out in paragraph no. 8.

10. In light of the above information, I believe that it is extremely likely that, in the event of a new trial, it will be possible to obtain evidence and testimony of other witnesses corroborating the information given me by Maximo Garcia and conclusively repudiating any contrary testimony of other witnesses.

11. The newly discovered evidence referred to herein is of a such a character that I stongly believe it would result in my acquittal in the event of a new trial.

12. By reason of the above facts, it is in the interest of justice that the Defendant, PERFECTO SOCORRO MUNOZ, be granted a new trial herein, at which the newly discovered evidence may be introduced.

Dated June 28th, 1991.

s/ Perfecto Munoz
PERFECTO SOCORRO MUNOZ

Subscribed and sworn to before me on June 28, 1991.

s/ Cecilia V. Garcia
NOTARY PUBLIC, STATE OF TEXAS

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NOTARY PUBLIC
STATE OF TEXAS
CECILIA V GARCIA
Notary Public
STATE OF TEXAS
My Commission Expires
February 26, 1995

Appendix G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

Plaintiff,

VS.

PERFECTO SOCORRO MUNOZ,

Defendant.

CRIMINAL NO. SA-91-CR-4(2)

NOTICE OF MOTION

TO: Mr. Ricard L. Durbin, Jr.
Assistant United States Attorney
727 E. Durango Blvd., A-601
San Antonio, Texas 78206-1199

Please take notice that on , 1991, at o'clock .M., or as soon thereafter as counsel can be heard, in Room , United States Court House in San Antonio, Texas, Defendant will bring the above motion on for hearing.

Dated June 28th, 1991.

s/ Julio A. Garcia
JULIO A. GARCIA
2602 ARKANSAS
LAREDO, TEXAS 78043

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(512) 724-1123
U.S. DISTRICT NO. 5211
ATTORNEY FOR DEFENDANT
PERFECTO SOCORRO MUNOZ

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Motion for New Trial On Newly Discovered Evidence has been served upon Mr. Richard L. Durbin, Jr., Asst. United States Attorney, at 727 E. Durango Blvd., A-601, San Antonio, Texas 78206-1199, on this the 28th day of June, 1991.

s/Julio A. Garcia
JULIO A. GARCIA

Appendix G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff

VS.

PERFECTO SOCORRO MUNOZ,

Defendant

CRIMINAL NO. SA-91-Cr-4(2)

ORDER

On this the day of , 1991, came on to be heard Defendant's Motion for New Trial on Newly Discovered Evidence, and this court having considered said motion after a plenary hearing, it is therefore ordered that the aforesaid motion is hereby GRANTED/DENIED.

DONE and ENTERED on this the day of , 1991.

UNITED STATES DISTRICT COURT

APPENDIX H — ORDER OVERRULING MOTION FOR NEW TRIAL FILED JULY 12, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

PERFECTO SOCORRO MUNOZ,

Defendant.

CRIMINAL NO. SA-91-CR-4(2)

ORDER

On this date came on to be considered the Defendant's Motion for New Trial on Newly Discovered Evidence in the above-styled and numbered cause. After considering Defendant's Motion, the attached affidavit, and the Government's response and attached affidavit, the Court finds that Defendant's Motion can be resolved without need for an evidentiary hearing.

Defendant's motion for new trial is based soley on the statements made by codefendant Maximo Garcia that purport to exonerate Defendant Munoz. Given the circumstances and timing of the statements, and having observed codefendant Garcia make such statements at his sentencing hearing on June 20, 1991, the Court finds that such statements do not constitute "newly discovered evidence" meriting a new trial. The information contained in the statements made by codefendant Garcia were clearly known to Defendant Munoz during trial, and from

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Munoz's trial testimony, it is clear that Munoz knew about the information prior to trial. Exculpatory statements made by a codefendant following conviction are not "newly discovered evidence." Accordingly, he has not shown the first element required for a new trial—that the evidence is newly discovered. Because Munoz made no efforts to obtain that testimony at trial the Court finds that he has failed to demonstrate the diligence required to justify a new trial.

The Court further finds that Munoz has failed even to establish that Garcia would so testify in his favor if called as a witness at a new trial. The Court is aware of Garcia's comments at his own sentencing, but finds those statements far less than credible or reliable. Garcia made his exculpatory comments after he was aware of the sentence that could be imposed, and was not under oath when he made those statements. The assertions contained in Munoz's affidavit are not any stronger, as they are not the sworn statements of Garcia. Because Defendant Munoz has not satisfactorily shown that Garcia would testify in accordance with Munoz's affidavit if called to testify, Munoz has failed to establish that a new trial would produce a different result. For these reasons, Munoz has failed to show the materiality of the statements as well. Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for New Trial on Newly Discovered Evidence be denied without hearing.

SIGNED and ENTERED this 11th day of July, 1991.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX I — ORDER FROM JUDGE PRADO WITH REGARDS TO INFORMER FILED AUGUST 30, 1991

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

PERFECTO SOCORRO MUNOZ,

Defendant.

CRIMINAL NO. SA-91-CR-4(2)

ORDER

On this date came on to be considered the Mc .ons of Defendant Perfecto Socorro Munoz in the above-styled and numbered cause to supplement the record on appeal and to unseal the record of interview with a confidential informant, to be included in the record on appeal. In the first motion, Defendant seeks to supplement the record on appeal with the video tape record of the sentencing proceeding of his codefendant in this cause, Maximo Garcia. In the second motion, Defendant seeks to unseal an *in camera* hearing held by the Court involving a confidential informant, conducted ancillary to the hearing on Defendant's motion to suppress evidence, and to make the record of that proceeding a part of the record on appeal. After considering Defendant's motions and the government's response, the Court finds the first motion is well taken and the second motion well taken in part. Accordingly,

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IT IS HEREBY ORDERED that Defendant's motion to supplement the record on appeal with the video tape record of the sentencing hearing for codefendant Maximo Garcia is granted. The District Clerk shall certify such record and forward it to the United States Court of Appeals for the Fifth Circuit to be made a part of the record on appeal.

IT IS FURTHER ORDERED that Defendant's motion regarding the *in camera* proceeding is granted in part, in the following particulars. The District Clerk shall cause to be prepared a transcript of the *in camera* proceeding held in connection with the Defendant's motion to suppress evidence. The transcript shall then be placed under seal and forwarded to the United States Court of Appeals for the Fifth Circuit to be made a part of the record on appeal. Copies of the transcript shall *not* be disclosed by the Clerk to the parties or to any other persons, and the person transcribing said proceeding shall *not* provide copies to the parties in this cause. Thereafter, the tape recording of the proceeding shall be placed again under seal by the Clerk.

SIGNED and ENTERED this 30th day of August, 1991.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX J — FIFTH CIRCUIT COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING FILED APRIL 20, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5704

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PERFECTO SOCORO MUNOZ a/k/a Chito,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(April 20, 1992)

Before GOLDBERG, DUHE and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

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s/ John M. (illegible)
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REHG-4